

ARKANSAS SUPREME COURT

No. CR 06-871

MICHAEL D. BELL
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered January 18, 2007

PRO SE MOTION FOR BELATED
APPEAL [CIRCUIT COURT OF UNION
COUNTY, CR 2005-52, HON. CAROL
CRAFTON ANTHONY, JUDGE]

MOTION FOR BELATED APPEAL
TREATED AS MOTION FOR RULE
ON CLERK AND GRANTED.

PER CURIAM

Michael D. Bell was convicted by a jury of possession of a controlled substance with intent to deliver (cocaine), possession of drug paraphernalia and three counts of delivery of a controlled substance (cocaine). His sentence was enhanced for distribution of a controlled substance near certain facilities and he received an aggregate sentence of 876 months' incarceration. Petitioner was represented at trial by his retained attorney, Don Gillaspie.

The judgment and commitment order was entered on December 5, 2005, and an amended judgment and commitment order was entered on January 4, 2006. Petitioner filed a *pro se* notice of appeal on January 4, 2006. Therein, he sought to appeal the sentence he received from the charge of possession of a controlled substance with intent to deliver (cocaine) in the amended judgment. Petitioner then filed a *pro se* motion for belated appeal in this court. As petitioner's *pro se* notice of appeal was timely filed, we treated the motion as a motion for rule on clerk. *See Johnson v. State*, 342 Ark. 709, 30 S.W.3d 715 (2000) (*per curiam*); *see also Muhammed v. State*, 330 Ark. 759, 957

S.W.2d 692 (1997) (*per curiam*).

We remanded the matter to the trial court for an evidentiary hearing on the issues of whether trial counsel was informed by petitioner within the time period allowed for filing a notice of appeal that he desired to appeal from the amended judgment and commitment order, and whether trial counsel was obligated to perfect an appeal. The trial court was directed to enter Findings of Fact and Conclusions of Law and submit the findings and conclusions to this court with the transcript of the evidentiary hearing. *Bell v. State*, CR 06-871 (Ark. Oct. 26, 2006) (*per curiam*). The Findings of Fact and Conclusions of Law and the transcript of the evidentiary hearing are now before us.

The court took testimony at the hearing from petitioner and trial counsel, Mr. Gillaspie. Mr. Gillaspie admitted that he knew that petitioner wished to file an appeal and made his wish known to him during the time allowed for filing a notice of appeal. However, Mr. Gillaspie mistakenly believed that another attorney would perfect the appeal although no motion to withdraw had been filed with the trial court by Gillaspie. The court concluded that Mr. Gillaspie knew that petitioner wished to appeal his convictions, and that he was obligated to perfect the appeal.

In no event may counsel simply abandon an appeal. Arkansas Appellate Procedure Rule—Crim. 16(a) provides in pertinent part that trial counsel, whether retained or court appointed, *shall* continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. It is well settled that under no circumstances may an attorney who has not been relieved by the court fail to preserve an appeal when the convicted defendant desires to appeal. *Johnson v. State*, 342 Ark. 709, 30 S.W.3d 715 (2000) (*per curiam*). When the judgment is entered in a criminal case and the trial attorney is made aware by the convicted defendant that the defendant desires to appeal within

the thirty-day period from the date of judgment allowed by Ark. R. App. P.–Crim. 2(a) for filing a notice of appeal, counsel is obligated to timely file a notice of appeal. *Spillers v. State*, 341 Ark. 749, 19 S.W.3d 35 (2000) (*per curiam*).

The obligation to preserve the appeal also exists if retained counsel believes the appellant is indigent and cannot pay the costs of the appeal or if counsel believes the appellant to be capable, but unwilling, to pay the costs of appeal. When an attorney desires to be relieved of the responsibility for an appeal because the appellant will not pay the costs or the attorney desires to have his client declared indigent, counsel's course of action must be an appropriate motion or motions filed here with a partial record.

Here, Mr. Gillaspie did not timely file a notice of appeal as requested by petitioner. It is clear from the record before us that petitioner was not at fault and that his attorney failed to timely file a notice of appeal. Where, as here, there is attorney error, a copy of the opinion will be forwarded to the Committee on Professional Conduct.

We direct our clerk to lodge the record so that the appeal from the amended judgment and commitment order will proceed. As petitioner contends that he is now indigent and the State has not contested that assertion, Mr. Gillaspie is appointed to continue as attorney-of-record. He is directed to file a petition for writ of *certiorari* within fifteen days to call up any additional portion of the record that may be necessary for an appeal to this court. A briefing schedule will be set when the complete record is lodged.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion for rule on clerk treated as motion for belated appeal granted.